STRAITS SETTLEMENTS REPORTS.

PUBLISHED BY AUTHORITY

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

November 7, 1940.

REX v. LOW TOH CHENG.

[SINGAPORE MAGISTRATE'S APPEAL No. 101 of 1940]

Appeal against acquittal—Rules and principles applicable—Credibility of evidence—Demeanour of witnesses.

On appeal by the Crown against acquittal it is sufficient for the Court to declare that having reviewed all the evidence in the case, and having formed an opinion of its weight and reliability different from that of the learned Magistrate, the Court has unhesitatingly come to the conclusion that the accused ought to have been convicted.

A Magistrate is entitled to disbelieve a witness at the trial and he usually gives reasons for the opinion which he has formed, but a general reference by the Magistrate in his grounds of judgment to the demeanour of witnesses, without condescending to any particulars, may give rise to the suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of the evidence but to the probabilities and which could not be supported on a detailed examination of the evidence.

Case referred to:—

(1) *Sheo Swarup v. The King Emperor* 61 Ind. App. 398.

MAGISTRATE'S APPEAL.

E. N. Griffith-Jones (Crown Counsel) for the Crown.

Accused (respondent) in person.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J.—The accused was originally charged, first with cheating one Neo Ban by dishonestly inducing him to deliver the sum of $10.00, and secondly, with cheating See Ban Thye by dishonestly inducing him to deliver the sum of $88.00.

The prosecution adduced evidence to shew that the accused sold matches for Chop Nam Thye on a commission basis, the commission being 40 cents on each case sold. This was admitted by the accused. It was also proved and admitted by the accused that two cases of matches were sold to Neo Ban for $22.00, and that the accused collected $10.00 out of the $22.00 due from Neo Ban and retained such sum in his possession. Similarly, eight cases of matches were sold to See Ban Thye, Chop Cheng Wah Heng, for $88.00 the whole of which was retained by the accused.

The evidence for the prosecution included the proprietor of Chop Nam Thye, the bill collector of Chop Nam Thye, the abovenamed Neo Ban and See Pong Thye (See Ban Thye), the proprietor of Chop Cheng Wah Heng and a clerk in the last named Chop.

From their evidence it was established that the matches were in each case sold at the end of May on one month's credit, and that at the end of June the accused himself collected the sums above mentioned. On the 30th June the accused absconded and was not seen again until he was arrested two months later. The collection of the moneys by the accused was discovered early in July when the bill collector of Chop Nam Thye attempted to collect the moneys from the customers and found that they had already paid the accused.

So far there can be no dispute. The prosecution further gave evidence that the accused was paid his commission immediately a sale was effected and not when payment was made, that there was nothing due to the accused for commission, and that the only person who was entitled to collect payment was the bill collector who had a proper receipt book for the purpose. The receipts which were to be handed over when the customers paid were put in as Exhibits 6 and 7.

At the close of the case for the prosecution the learned Magistrate held that there could be no conviction on charges of cheating the customers. I think this ruling was correct. The person who suffered from these transactions was the proprietor of Chop Nam Thye and not the customers. The charges were accordingly amended to charges under S. 403 (criminal misappropriation); the accused claimed trial on the amended charges.

He gave evidence admitting the main points of the prosecution case as detailed above. His defence was in effect that he was authorised to collect bills, that he was owed $62.00 for commission, and that he had not yet gone into accounts with the proprietor.

The learned Magistrate, thereupon, acquitted the accused and the Crown lodged an appeal.

The grounds of judgment consist of eight lines and are so manifestly inadequate that if I were not satisfied that the case is clear beyond all possible doubt, I should have called upon the learned Magistrate to supply further and better grounds for his decision.

As the grounds of judgment are so short, it will be convenient to set them out in full. I have subdivided the judgment into numbered paragraphs for easy reference:—

"(1) In this case the complainant can produce no proper books of account to shew how and when commission was paid to the accused.

(2) There are contradictions in the prosecution evidence on material points, and

(3) I am satisfied that this evidence is substantially false.

(4) I have taken full opportunity of watching the demeanour of the witnesses.

(5) The accused gives a frank statement and although closely questioned on the material points, has satisfied me with his evidence.

As to (1), if the payment of the commission can be proved *aliunde,* a dishonest commission-agent is not entitled to an acquittal merely because the complainant has not kept the books which in the opinion of the learned Second Magistrate a Chinese business man ought to keep. The point is however, quite irrelevant as the accused has admitted retaining in his possession $36.00 more than was due to him, even on his own account of the transactions.

As to (2), no contradictions are specified in the judgment. There was a discrepancy between the complainant and his bill collector as to the amount of commission which the accused had earned. The complainant paid the commission and was in a position to know. This discrepancy is also of no importance in view of the accused's admission referred to under (1).

As to (3), a general statement of this kind is not very helpful, where as I have shown, the greater part of the evidence for the prosecution was admitted by the accused. The same evidence cannot be false when given by the prosecution and true when given by the accused.

As to (4), a Magistrate is entitled to disbelieve a witness and usually gives reasons for the opinion which he has formed, but a general reference to the demeanour of witnesses, without condescending to any particulars, gives rise to the suspicion that an attempt is being made to bolster up a verdict which is contrary not only to the weight of evidence but to the probabilities, and which could not be supported on a detailed examination of the evidence. In a recent case before the last Singapore Court of Appeal and involving a pure question of fact, a Supreme Court Judge of nearly 30 years' experience in Malaya, much of which was spent in the Chinese Protectorate stated frankly that he could draw no safe conclusion from the demeanour of Chinese witnesses in the case before him. The learned Magistrate, after a few months in Malaya, experienced no such difficulty, but, for the reasons given, the Court is unable to treat the learned Magistrate's opinion of the credibility of the witnesses as being in any way conclusive.

As to (5) it is true that the accused's statement was frank to the extent that he had admitted having taken $36.00 to which he had no possible claim. He gave as his reason for not paying the money over that he had not yet been able to go into accounts with the proprietor. He did not explain why he disappeared on the 30th June for over two months immediately after he collected the money from the complainant's customers, and was not seen again until he was arrested on September 14th. These matters were evidently not considered of sufficient importance to be noticed in the learned Magistrate's grounds of judgment.

Before the decision of the Privy Council in *Sheo Swarup v. The King-Emperor*[1] there was authority for saying that the High Court had no power or jurisdiction to reverse an order of acquittal on a matter of fact, except in cases in which the lower Court had "absolutely blundered," or had "through incompetence, stupidity, or perversity" reached "such distorted conclusions as to produce a position of miscarriage of justice," or had in some other way so conducted or misconducted itself as to produce a glaring miscarriage of justice, or had been tricked by the defence so as to produce a similar result.

The Privy Council has disapproved such rulings and has decided that the jurisdiction of the Appellate Court is quite unfettered, provided that it acts in accordance with the rules and principles well known and recognised in the administration of justice. If therefore the Court considers that an order of acquittal should be reversed, it is no longer called upon to choose between the somewhat invidious alternatives referred to in the last preceding paragraph. It will be sufficient if the Court declares that, having reviewed all the evidence in the case, and having formed an opinion of its weight and reliability different from that of the learned Magistrate, the Court has unhesitatingly come to the conclusion that the accused ought to have been convicted.

The appeal is therefore allowed, and the accused convicted on both charges and sentenced to six months' rigorous imprisonment on each, the terms to run concurrently.

Appeal allowed.